Public Bank Bhd & Anor v Exporaya Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–3367 OF 2010
RAMLY ALI, AZHAR MA'AH AND ABDUL AZIZ ABDUL RAHIM JJCA
16 MAY 2012

Banking — Banker and customer — Duty of care — Change in mandate by customer followed by letter of complaint alleging that previous mandate should remain unchanged — Bank froze bank account — Whether freezing of bank account and not honouring three cheques issued by customer were justifiable — Whether bank had sufficient grounds to freeze account — Whether bank had breached its duty to honour cheques

At all material times the respondent company, a customer of the first appellant bank, had maintained a current account with the branch of the first appellant bank ('the bank account') in which the second appellant was the branch manager. On 3 August 2007, the respondent had applied to change the mandate or signatories to operate the bank account, by adding two new signatories and dropping the name of an existing signatory, one Musa bin Bunya ('Musa'), on the grounds that he had resigned as a director of the respondent company. This application was approved by the first appellant. However, on 30 August 2007, the first appellant received a letter of complaint signed by two directors of the respondent, namely Musa and Adjes bin Bunya ('Adjes'), indicating that the previous mandate given by the respondent company should remain unchanged ie that the bank account should continue to be operated by Adjes, James Wong and/or Christopher James Lagen and not otherwise. Upon receiving the letter of complaint the first appellant bank immediately froze the bank account. During the freezing of the account, three cheques were issued by the respondent that were rejected and returned to the respective banks with the remark 'pending confirmation' printed on them by the first appellant. The respondent filed a suit against the appellants for damages arising from the wrongful freezing of the respondent's bank account. It was the respondent's case that the first appellant had not behaved reasonably and had failed to discharge its duty of care towards the respondent when it froze the bank account unilaterally without any inquiry or notice to the respondent. The respondent also submitted that the wrongful dishonour of the cheques by the appellant bank amounted to a breach of contract and that the printing of the words 'pending confirmation' on them was libelous and defamatory. Consequently the respondent claimed special damages of RM1.5m, general damages of RM2.5m and aggravated or exemplary damages of RM1.5m. The appellants defended their action by submitting that the freezing of the bank

account was not wrongful and that their action was fully justified as what other prudent bankers would have done in similar circumstances. The trial judge, who found that the appellants had not acted reasonably and had failed to discharge their duty of care towards the respondent when they froze the bank account unilaterally without making any inquiry or informing the respondent of their intention to do so, gave judgment in favour of the respondent and ordered the appellants to pay the respondent damages in the sum of RM250,000 with costs. This was the appellants appeal against that decision. In this appeal the appellants submitted that the trial judge had erred in law and in fact by failing to consider the fact that the appellants had sufficient grounds to freeze the bank account and that the appellants' refusal to execute the respondent's instruction on the three cheques was fully justified.

Held, allowing the appeal with costs of RM10,000:

(1) Applying the legal principles to the facts and circumstances of the present case, it was found that the letter of complaint together with all the supporting documents, namely the police reports lodged by the directors of the respondent company and the searches with the Companies Commission of Malaysia, were sufficient to create reasonable ground and belief in the appellants about the validity of the new mandate as to the change in the signatories to the bank account. In the circumstances the appellants could not disregard the letter of complaint and were clearly put on inquiry to freeze the bank account pending further inquiry to determine the dispute (see paras 35–37).

(2) The letter of complaint was hand delivered to the first appellant at about 4pm on the eve of a public holiday, which was followed by the weekend holidays ie Saturday and Sunday. On these days the appellants had no opportunity to verify the allegations raised by the respondent in the letter of complaint. The first appellant then froze the bank account on the Monday after the weekend holidays before it started its inquiry. This inquiry verified that Adjes and Musa were still directors of the respondent and lent credibility to the letter of complaint. In the circumstances, the first appellant had done the correct thing in freezing the account (see paras 38–40).

(3) The paramount duty of the first appellant in the circumstances of the present case was to safeguard or protect the customer's money in the account held by the bank, and this duty overrode the bank's duty to honour cheques. The first appellant was correctly guided by this principle of law and could not be faulted for freezing the bank account. There was no mala fide element on the part of the first appellant bank and it had not breached its duty of care towards the respondent. Further, due to the urgency of the situation, it was not practical for the first appellant bank to

inform the respondent about the intended freezing of the bank account before it was carried out (see paras 41–44).

(4) In the present case, the real reason for the three cheques not being honoured by the first appellant was that the bank account was frozen pending confirmation on the validity of the mandate. As such, the words 'pending confirmation' printed on the cheques when they were dishonoured actually indicated the real reason. Those words neither disparaged the respondent's reputation nor indicated that the respondent had insufficient funds in its account. They were therefore not defamatory or libelous in nature (see para 46).

[Bahasa Malaysia summary

Pada setiap masa matan responden syarikat, pelanggan perayu pertama bank, telah menyelenggarakan akaun semasa dengan cawangan perayu pertama bank ('akaun bank tersebut') di mana perayu kedua adalah pengurus cawangan. Pada 3 Ogos 2007, responden telah memohon untuk menukar mandat atau penandatangan untuk mengendalikan akaun bank tersebut, dengan menambah dua penandatangan baru dan mengeluarkan nama penandatangan yang ada, iaitu Musa bin Bunya ('Musa'), atas alasan bahawa dia telah berhenti kerja sebagai pengarah responden syarikat. Permohonan ini telah diluluskan oleh perayu pertama. Walau bagaimanapun, pada 30 Ogos 2007, perayu pertama telah menerima surat aduan yang ditandatangani oleh dua pengarah responden, iaitu Musa dan Adjes bin Bunya ('Adjes'), menyatakan bahawa mandat terdahulu yang diberikan oleh responden syarikat patut kekal tanpa diubah iaitu agar akaun bank tersebut hendaklah terus dikendalikan oleh Adjes, James Wong dan/atau Christopher James Lagen dan bukan sebaliknya. Setelah menerima surat aduan perayu pertama bank dengan serta merta membeku akaun bank tersebut. Sewaktu pembekuan akaun tersebut, tiga cek telah dikeluarkan oleh responden yang telah ditolak dan dikembalikan kepada bank-bank berkaitan dengan kenyataan 'pending confirmation' yang dicetak atasnya oleh perayu pertama. Responden telah memfailkan guaman terhadap perayu-perayu untuk ganti rugi yang timbul daripada pembekuan akaun bank responden secara salah. Ia adalah kes responden bahawa perayu pertama tidak berkelakuan secara munasabah dan telah gagal menjalankan kewajipan berjaga-jaganya terhadap responden apabila ia membekukan akaun bank tersebut secara unilateral tanpa apa-apa siasatan atau notis kepada responden. Responden juga berhujah bahawa cek-cek tak laku yang salah oleh perayu bank tersebut membentuk pelanggaran kontrak dan bahawa cetakan perkataan-perkataan 'pending confirmation' atasnya bersifat libel dan berunsur fitnah. Berikutan itu responden menuntut ganti rugi khas berjumlah RM1.5 juta, ganti rugi am berjumlah RM2.5 juta dan ganti rugi tambahan atau teladan berjumlah RM1.5 juta. Perayu-perayu membela tindakan mereka dengan berhujah bahawa pembekuan akaun bank tersebut adalah tidak salah dan bahawa tindakan mereka adalah wajar berkenaan apa yang akan dilakukan

oleh jurubank lain yang berhemah jika dalam keadaan yang sama. Hakim perbicaraan, yang mendapati bahawa perayu-perayu tidak bertindak dengan munasabah dan gagal menjalankan kewajipan berjaga-jaga mereka terhadap responden apabila mereka membekukan akaun bank secara unilateral tanpa membuat apa-apa siasatan atau memberitahu responden berhubung niat mereka berbuat demikian, telah menyampaikan penghakiman menyebelahi responden dan memerintahkan perayu-perayu membayar responden ganti rugi berjumlah RM250,000 dengan kos. Ini adalah rayuan perayu-perayu terhadap keputusan tersebut. Dalam rayuan ini perayu-perayu berhujah bahawa hakim perbicaraan terkhilaf dari segi undang-undang dan fakta kerana gagal mengambil kira fakta bahawa perayu-perayu mempunyai alasan mencukupi untuk membeku akaun bank tersebut dan bahawa keengganan perayu-perayu untuk melaksanakan arahan responden ke atas ketiga-tiga cek itu adalah wajar.

Diputuskan, membenarkan rayuan dengan kos berjumlah RM10,000:

(1) Dengan mengguna pakai prinsip-prinsip perundangan kepada fakta dan keadaan kes ini, adalah didapati bahawa surat aduan bersama dengan semua dokumen sokongan, terutama laporan-laporan pos yang dibuat oleh pengarah-pengarah responden syarikat dan carian-carian dengan Suruhanjaya Syarikat Malaysia adalah mencukupi untuk membuat alasan dan keyakinan munasabah terhadap perayu-perayu berhubung kesahan mandat baru tentang perubahan penandatangan akaun bank tersebut. Dalam keadaan itu perayu-perayu patut mengambil kira surat aduan tersebut dan jelas perlu disiasat untuk membeku akaun bank tersebut sementara menunggu siasatan selanjutnya bagi menentukan pertikaian tersebut (lihat perenggan 35–37).

(2) Surat aduan tersebut telah dihantar dengan tangan kepada perayu pertama lebih kurang pukul 4 petang pada hari sebelum cuti umum, yang diikuti oleh cuti hujung minggu iaitu hari Sabtu dan Ahad. Pada hari-hari tersebut perayu-perayu tiada peluang untuk mengesahkan pengataan yang ditimbulkan oleh responden dalam surat aduan tersebut. Perayu pertama kemudian telah membeku akaun bank tersebut pada hari Isnin selepas cuti hujung minggu itu sebelum ia memulakan siasatannya. Siasatan ini mengesahkan bahawa Adjes dan Musa masih pengarah-pengarah responden dan memberi kepercayaan kepada surat aduan itu. Dalam keadaan itu, perayu pertama telah melakukan perkara yang wajar dengan membekukan akaun tersebut (lihat perenggan 38–40).

(3) Kewajipan utama perayu pertama dalam keadaan kes ini adalah untuk mengawal atau melindungi wang pelanggan dalam akaun yang dipegang oleh bank, dan kewajipan ini melampaui kewajipan bank untuk menjelaskan cek-cek. Perayu pertama adalah betul berpandukan prinsip

undang-undang ini dan tidak boleh dipersalahkan kerana membekukan akaun bank tersebut. Tiada elemen mala fide di pihak perayu pertama bank dan ia tidak melanggar kewajipan berjaga-jaganya terhadap responden. Selanjutnya, akibat keadaan mendesak, adalah tidak praktikal untuk perayu pertama bank memberitahu responden tentang niat membekukan akaun bank tersebut sebelum ia dilaksanakan (lihat perenggan 41–44).

(4) Dalam kes ini, sebab sebenar ketiga-tiga cek tersebut tidak dijelaskan oleh perayu pertama adalah kerana akaun bank tersebut telah dibekukan sementara menunggu pengesahan berhubung kesahan mandat itu. Oleh itu, perkataan-perkataan 'pending confirmation' yang dicetak atas cek-cek tersebut walhal tidakpun dijelaskan menunjukkan alasan sebenar. Perkataan-perkataan tersebut tidak menjejaskan reputasi responden atau menunjukkan responden tidak mempunyai kewangan mencukupi dalam akaunnya. Oleh itu ia tidak berunsur fitnah atau libel (lihat perenggan 46).]

Notes

For cases on duty of care, see 1(2) *Mallal's Digest* (4th Ed, Reissue) paras 2288–2301.

Cases referred to

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2006] 5 MLJ 1; [2006] 3 CLJ 1, FC (folld)

Bank of New South Wales v Goulburn Valley Butter Co Pty Ltd [1902] AC 543, PC (refd)

Barclays Bank plc v Quincecare Ltd [1992] 4 All ER 363, QBD (folld)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) & Another Appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)

Lipkin Gorman (a firm) v Karpnale Ltd and another [1992] 4 All ER 409, CA (folld)

Selangor United Rubber Estate Ltd v Cradock (No 3) [1968] 2 Lloyd's Rep 289 (refd)

Sim v Stretch [1936] 2 All ER 1237, HL (refd)

Westminster Bank Ltd v Hilton (1926) 43 TLR 124, HL (refd)

Yogambikai Nagarajah v Indian Overseas Bank [1997] 1 SLR 258, CA (refd)

Appeal from: Suit No K–22–208g of 2007 (High Court, Kota Kinabalu)

Noor Ashikin Ag Anak (Jayasuriya Kah &Co) for the appellants.
Mohd Nor Yusof (Adnan Yusof & Saleh) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the learned judicial commissioner ('JC') of the High Court at Kota Kinabalu dated 29 October 2010, where it was held that the first and second appellants, were negligent in freezing the respondent's account with the first appellant (Account No 3134351226) and entered judgment against the appellants for damages in the sum of RM250,000.

FACTUAL BACKGROUND

[2] The respondent, who was the plaintiff at the High Court, was at all material times a customer of the first appellant bank, who was the first defendant at the High Court. The respondent opened its Current Account No 3134351226 on 6 October 2005 at its branch at Taman Che Mei, Jalan Penampang, Kota Kinabalu. The second appellant, who was the second defendant at the High Court, was the first appellant's branch manager at the said branch.

[3] On 3 August 2007, the respondent applied to change the mandate or signatories in respect of the operation of the said account based on the minutes of directors meeting dated 31 July 2007 where it was resolved that 'fresh authority authorizing ANY TWO of the following persons to jointly operate Company's Bank Account presently maintained at Lido Branch of Public Bank Berhad Sabah BE and IS HEREBY APPROVED:

(i) Adjes bin Bunya

(ii) Pang Fook Ken @ Peter

(iii) Lee Nyet Yin'.

[4] As stated in the said minutes of meeting it was also resolved that 'all previous written authorities to operate Company's Bank Account be forthwith superceded by the aforesaid fresh authority BE and IS HEREBY APPROVED'.

[5] On 30 August 2007, the appellant bank received a letter dated 27 August 2007, written on the respondent's letter head and signed by Adjes bin Bunya ('Adjes') and Musa bin Bunya ('Musa') who claimed to be the directors and

shareholders of the respondent. The said letter, addressed to the manager, Public Bank Bhd, Lido Branch, Kota Kinabalu, Sabah reads as follows:

> Dear Sir,
>
> ACCOUNT NO. 3134351226
>
> EXPORAYA SDN BHD
>
> We refer to the above.
>
> We the undersigned being the directors and shareholders of Exporaya Sdn Bhd hereby write to notify your esteemed institution of the following matters:-
>
> (1) We understand from reliable source that third parties known as Pang Fook Ken @ Peter and Lee Nyet Yin have claimed and hold themselves as the directors of Exporaya Sdn Bhd;
>
> (2) That the said Pang Fook Ken @ Peter and/or Lee Nyet Yin have purportedly submitted to you the company's board of directors' resolution in connection with the purported resignation and appointment of directors and the conduct of the current account with your esteemed institution.
>
> We further wish to notify you as follows:
>
> 3. That we categorically deny having resigned nor tendered our resignation as directors of the company nor sold or transferred our shares in the said company to any other party under any circumstances;
>
> 4. That we have not executed any board of directors' resolution dated 30 July 2007 in connection with the purported resignation of Musa Bin Bunya and/or the purported appointment of Pang Fook Ken @ Peter and Lee Nyet Yin as directors of the company;
>
> 5. That any board of directors' resolution purportedly signed by any of the undersigned in relation to the resignation of any of the undersigned and/or the appointment of the said Pang Fook Ken @ Peter and/or Lee Nyet Yin as director was created without our knowledge and/or fraudulently;
>
> 6. That we have not called nor authorized nor attended any board of directors' meeting of the company on 30 July 2007 and that no board of directors' meeting of the company has ever taken place on the 30 July 2007;
>
> 7. That any instruction or authority given to your esteemed institution in relation to the resignation of any of the undersigned as directors and/or the appointment of Pang Fook Ken @ Peter and/or Lee Nyet Yin as directors of the company is illegal null and void and have no effect whatsoever;
>
> 8. That we have accordingly lodged the relevant reports with Suruhanjaya Syarikat Malaysia and Polis DiRaja Malaysia.

We believe that the said Pang Fook Ken @ Peter and/or the said Lee Nyet Yin has/have wrongfully and fraudulently cause and/or attempted to wrongfully and fraudulently cause the resignation of any of the undersigned as the company's director with intent to deceive and/or deprive any or both of us of our right and privilege in Exporaya Sdn Bhd.

In the premises, we hereby notify you as follows:

9. That we remain the only directors and shareholders of Exporaya Sdn Bhd;

10. Any purported appointment of Pang Fook Ken @ Peter and/or Lee Nyet Yin is illegal, null and void and have no effect whatsoever;

11. That the previous mandate given by us to your esteemed institution shall remain unchanged, that is, the current account shall continue to be operated by Adjes Bin Bunya, James Wong and/or Christopher James Lagan and not otherwise;

12. That we will hold your esteemed institution responsible and/or liable for any loss and damage in the event of your taking instruction from the said Pang Fook Ken @ Peter and/or Lee Nyet Yin.

For your esteemed institution's information, a copy each of the report lodged with Suruhanjaya Syarikat Malaysia and Polis Diraja Malaysia are enclosed herewith for your attention and perusal.

We so notify. Thank you.

Yours faithfully

for Exporaya Sdn Bhd

_____	_____
Adjes Bin Bunya	Musa bin Bunya
NRIC No. 700322-12-5103	NRIC No. 610103-12-5585
Director	Director

[6] The said complaint letter was hand delivered to the appellant bank by Musa and one James Wong, who was also one of the previous authorised signatories of the said account on 30 August 2007.

[7] The next working day (Monday — 3 September 2007) the appellant bank immediately carried out their investigation, the earliest of which was the search with Companies Commission of Malaysia ('CCM') which showed that both Adjes and Musa were in fact still the directors of the respondent, which supported the contents of the said complaint letter. Immediately after that the appellant bank froze the respondent's account. At that time the respondent had a credit balance of RM23,022.16 in the said account.

[8] During the freezing of the said account, it is not disputed that three

cheques were issued by the respondent (purportedly signed by Adjes and Lee Nyet Yin) to the respective payees ie Lee Nyet Yin (RM1,000), Wong Foo Fah (RM500) and Sabah Electricity Sdn Bhd (RM481.04). Those cheques were presented to the appellant bank by the respective payees through their banks for payment but had been rejected and returned to the respective banks marked 'pending confirmation' printed on the slip issued by the appellant bank.

[9] The respondent filed the present suit against both the first and second appellants for damages arising from the appellant bank's freezing of the respondent's account.

THE RESPONDENT/PLAINTIFF'S CASE

[10] The respondent, as the plaintiff at the court below, claimed that the freezing of its account by the appellant bank was wrongful and that the appellant bank in doing so had acted outside the normal scope of banker's role. The respondent submitted that the appellant bank has an obligation to honour the customer's mandate regarding the payment of money from the customer's account. In the present case, the respondent contended that the appellant bank did not behave reasonably and had failed to discharge its duty of care towards the respondent when it froze the respondent's account unilaterally without any inquiry or notice to the respondent.

[11] The respondent further submitted that the wrongful dishonour of the respondent's cheques amounted to a breach of contract by the appellant bank against the respondent as its customer; in consequence of that the respondent had suffered damage to its reputation. The respondent further submitted that the returning of the cheques with the words 'Pending Confirmation' printed on them was libelous and defamatory; and had injured the credit and reputation of the respondent as a business entity; and as such the respondent be entitled to substantial damages. The respondent claimed against the appellants, inter alia, for special damages of RM1.5m, general damages of RM2.5m, aggravated or exemplary damages of RM1.5m.

THE APPELLANTS'/DEFENDANTS' CASE

[12] The appellants, as the defendants at the court below defended their action by submitting that the freezing of the said account was not wrongful and it was made based on sufficient grounds. The appellants further contended that their action in the circumstances of the case was fully justified as what other prudent bankers would have done in place of the appellants. The appellants also submitted that they were not negligent in freezing the said account.

[13] The appellants also contended that the marking of the words 'Pending

Confirmation' on the three cheques in question was not libelous or defamatory. On the issues of the award of damages by the learned JC, the amount RM250,000 as awarded was excessive and made without basis.

AGREED ISSUES

[14] At the trial, the parties have agreed on the following issues to be determined by the court, namely:

(a) whether the freezing of the plaintiff's (the respondent) account by the first and second defendants was wrongful;

(b) whether the first and second defendants (the appellants) acted outside of their normal scope of banker's roles when they disregarded the plaintiff (the respondent) company secretary confirmation given by a letter dated 6 September 2007 that the plaintiff (the respondent) Form 49 dated 30 July 2007 had been lodged with the registrar of companies on 8 August 2007;

(c) whether the first and second defendants (the appellants) failed to make proper inquiry pertaining to the allegation of fraud by the former directors of the plaintiff (the respondent) before freezing the plaintiff's (the respondent) account;

(d) whether the return of the plaintiff's (the respondent) cheques with the marking 'Pending Confirmation' was libelous or defamatory; and

(e) in the event that all the above issues are answered in the affirmative, whether the plaintiff (the respondent) is entitled to aggravated or exemplary damages.

DECISION OF THE HIGH COURT

[15] The learned JC at the High Court gave judgment in favour of the respondent where the respondent's claim was allowed with costs and the appellants were ordered to pay the respondent a sum of RM250,000 in damages.

[16] The learned JC found that based on the facts and evidence adduced during trial, the appellants bank did not act reasonably and had failed to discharge its duty of care towards the respondent when it froze the respondent's account unilaterally, without making any inquiry nor inform the respondent of its intention to do so.

[17] The learned JC had also accepted the respondent's submission that the

appellant bank's failure to notify the respondent of its intention to freeze the account which led to the respondent's cheques being dishonored tantamount to a breach of contract and in consequence of that the respondent had suffered damages to its reputation.

[18] On the marking of the words 'Pending Confirmation' on the cheques in question, the learned JC was of the view that those words were libelous and defamatory to the respondent and had tarnished the reputation of the respondent's business. To the learned JC, those words and the returning of the cheques to the collecting bank would mean 'that the plaintiff (the respondent) did not have sufficient fund in its account when it issued the cheques and was therefore deceitful or fraudulent or that it was insolvent'.

[19] The respondent's claim for exemplary or aggravated damages were disallowed by the learned JC on the ground that 'there was no evidence that the first defendant (the appellant bank) had acted intentionally to injure the plaintiff's (the respondent) credit and reputation or with mala fide'.

FINDINGS OF THE COURT OF APPEAL

[20] Before this court, the first ground highlighted by the appellants' counsel is that the learned JC had erred in law and in fact for failing to consider the fact that the appellants had sufficient grounds to freeze the said account and that the appellants' refusal to execute the respondent's instruction on the three cheques was fully justified.

[21] The main issues in the present appeal relates to the relationship between a bank (the appellant bank) and its customer (the respondent).

[22] It is well-settled that primarily the relationship between a bank and its customer (account holder) is that of debtor and creditor, but quad the drawing and payment of the customer's cheques as against the money of the customer's in the banker's hand the relationship is that of principal and agent; and as an agent the bank owed fiduciary duties to the customer and prima facie was also bound to exercise reasonable care and skill in carrying out the transactions of its principal. The above proposition was accepted and adopted by the Queen Bench Division (Commercial Court) of England in the case of *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363; and the House of Lords in *Westminster Bank Ltd v Hilton* (1926) 43 TLR 124).

[23] In that case (*Barclays Bank*) Steyn J ruled that:

Accordingly, it was an implied term of the contract between the bank and the customer that the bank would observe reasonable skill and care in and about executing the customer's orders but generally that duty was subordinate to the bank's other conflicting contractual duties, such as its prima facie duty when it received a valid and proper order to execute the order promptly on pain of incurring liability for consequential loss to the customer. If the bank executed the order knowing it to be dishonestly given, or shut its eyes to the obvious fact of the dishonesty, or acted recklessly in failing to make such inquiries as an honest and reasonable man would make, the bank would plainly be liable. Furthermore, a banker was under a duty to refrain from executing an order if and for as long as he was put on inquiry in the sense that he had reasonable grounds (although not necessarily proof) for believing that the order was an attempt to misappropriate funds.

[24] The contractual duties of a bank towards a customer was established by the English Court of Appeal in the case of *Lipkin Gorman (a firm) v Karpnale Ltd* [1986] [1992] 4 All ER 331 where Alliott J held the following propositions:

(1) The bank is entitled to treat the customer's mandate at its face value save in extreme cases. (2) The bank is not obliged to question any transaction which is in accordance with the mandate; unless a reasonable banker would have grounds for believing that the authorised signatories are misusing their authority for the purpose of defrauding their principal or otherwise defeating his true intention. (3) It follows that if a bank does not have reasonable grounds for believing that there is fraud, it must pay. (4) Mere suspicion or unease do not constitute reasonable grounds and are not enough to justify a bank in failing to act in accordance with a mandate. (5) A bank is not required to act as an amateur detective.

[25] It is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing the customer's order, mandate or direction. However that duty must be subordinate to the bank's other conflicting contractual duties particularly in cases where the bank received a valid and proper order or mandate which it is prima facie bound to execute promptly on pain of incurring liability for consequential less to the customer, when It is subsequently established that the order or mandate was an act of fraud or misappropriation of money by the director or officer of the customer. If the bank executes order knowing it to be dishonestly given, shutting its eyes to the obvious fact of dishonesty or fraud, or acting recklessly in failing to make such inquiries as an honest and reasonable banker would make, the bank will plainly be liable (see decision of Steyn J in *Barclay Bank plc*).

[26] The law should not impose too burdensome an obligation on bankers which may hamper the effective transaction of banking business unnecessarily. On the other hand, the law should guard against the facilitation of fraud and

exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. An appropriate line of balance must be drawn. The compromise was clearly established in the case of *Barclay Bank plc* adopting an earlier principle laid down in *Lipkin Gorman* as follows:

> In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that a banker must refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company. And, the external standard of the likely perception of an ordinary prudent banker is the governing one. That in my judgment is not too high a standard. Indeed, the evidence of Mr Redhead, a most experienced banker, showed that the principle which I have stated is the very criterion usually applied by bankers. He used the language of a banker being put on inquiry.

[27] The position Singapore is the same. It follows the same principles laid down in the above authorities. In *Yogambikai Nagarajah v Indian Overseas Bank* [1997] 1 SLR 258 the Singapore Court of Appeal following and adopting the decision in the case of *Bank of New South Wales v Goulburn Valley Butter Co Pty Ltd* [1902] AC 543, made the following ruling:

> The relationship between a bank and the deposit account holder was premised on a debtor-creditor relationship. The bank has an obligation to honour the customer's mandate as regards the payment of money from that account. The bank's duty to pay on demand of an account holder however co-existed with a duty to take reasonable care in all the circumstances as agent of the account holder. The duty to take reasonable care in the discharge of its obligations under the contract between banker and customer included withholding payment where there had been fraudulent conduct resulting in wrongful loss by a party. The question in every case, including the present, was whether the bank behaved reasonably in view of all the circumstances and discharged its duty of case.

[28] In *Bank of New South Wales v Goulburn Valley Butter Co Pty Ltd*, Lord Davey at p 550, stressed that:

> The law is well settled that in the absence of notice of fraud or irregularity a banker is bound to honour his customer's cheque. Of course, where somebody cries 'Fraud', it is not always the case that the bank must withhold payment. The question in every case, including the present, is whether the bank behaved reasonably in view of all the circumstances and discharged its duty of care.

[29] The standard of the reasonable care and skill to be exercised by a bank towards its customer is an objective standard. This principle was made clear by Ungoed-Thomas J in the case of *Selangor United Rubber Estate Ltd v Cradock (No 3)* [1968] 2 Lloyd's Rep 289 when he said:

> To my mind, … a bank has duty under its contract with its customer to exercise 'reasonable care and skill' in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stockbroker into his account of proceeds of sale of his client's sale) of necessity does not suggest that it is out of the ordinary course of business. If 'reasonable care and skill' is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in that exercise of reasonable care and skill again depends on circumstances. Where it is to inquire, the failure to make inquiry is not excused by the conviction that the inquiry would be futile, or that the answer would be false.

[30] May LJ in *Lipkin Gorman v Karpnale Ltd* described the standard of care as follows:

> To a substantial extent the banker's obligation under such a contract is largely automatic or mechanical. Presented with a cheque drawn in accordance with the terms of that contract, the banker must honour it save in what I would expect to be exceptional circumstances …
>
> … only when the circumstances are such that any reasonable cashier would hesitate to pay a cheque at once and refer it to his or her superior, and when any reasonable superior would hesitate to authorise payment without inquiry, that a cheque should not be paid immediately on presentation and such inquiry made.

[31] The customer's action could only succeed when there was a breach of contract between himself and the bank. The bank is not entitled to ignore evidence or information showing that the customer is being defrauded. On this issue Parker LJ (with whom Nicholls LJ agreed) in the said *Lipkin Gorman* case, said:

> I would not, however, accept that a bank could always properly pay if it had reasonable grounds for a belief falling short of probability. The question must be whether, if a reasonable and honest banker knew of the relevant facts, he would have considered that there was a serious or real possibility, albeit not amounting to a probability, that its customer might be being defrauded … If it is established, then in my view a reasonable banker would be in breach of duty if he continued to pay cheques without inquiry. He could not simply sit back and ignore the situation. In order so to establish the customer cannot, of course, rely on matters which a meticulous *ex post facto* examination would have brought to light.

[32] The correct test, in our opinion, must be whether a reasonably prudent banker, faced with the same circumstances, would regard the course of action taken on the facts justifiable. In each fact situation, common sense must prevail. In every case, we must determine the bank's obligations against the background of day to day commercial activity. We are in full agreement with the above authorities in that faced with what appears to be a genuine mandate presented by agent acting within his authority, when the respondent applied to change the mandate or signatories in respect of the account in question. The bank's duty of care does not require it to do anything other than to honour the mandate in the absence of circumstances which put the bank on enquiry. The same principle was adopted by the Singapore Court of Appeal in the case of *Yogambikai Nagarajah v Indian Overseas Bank*.

[33] In Malaysia, the Federal Court in the case of *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 5 MLJ 1; [2006] 3 CLJ 1, followed and adopted the principle laid down in *Barclay Bank v Quincecare Ltd* and *Lipkin Gorman v Karpnale Ltd*. In that case, the Federal Court ruled as follows:

> To our minds, if a bank executes an order knowing it to be dishonestly given, or shuts its eyes to an obvious fact of dishonesty, or acted recklessly in failing to disclose material facts, the bank will plainly be liable. In our judgment, it is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing customer's orders.

[34] It was further held in that case that:

> A bank is not obliged to question any transaction which is in accordance with the customer's mandate, unless there are grounds for believing that these was a misuse of authority for the purpose of committing a fraud. See *Lipkin Gorman (a firm) v Karpnale Ltd and Another* [1992] 4 All ER 409.

[35] Applying the above principles, to the facts and circumstances of the present case, the court must determine whether the appellant bank had properly discharges its duty of care to the respondent based on the accepted standard in the earlier judicial pronouncements in the above authorities ie whether the reasonably prudent banker faced with the same circumstances would regard the course of action taken in freezing the respondent's account and not honouring the three cheques issued by the respondent, as justifiable.

[36] In the present case, on 3 August 2007 the appellant bank approved the respondent's application to change signatories to operate its current account with the appellant bank where two new signatories namely Pang Fook Ken @ Peter and Lee Nyet Yin were added and the name Musa Bunya was dropped on the ground that he had resigned as a director of the respondent company on

27 July 2007. At this stage, the application was approved by the appellant bank as on the face of the supporting documents submitted, there was no 'abnormality' or 'irregularity' detected. In the absence of notice of fraud or other irregularity a bank is duty bound to honour the customer's instruction (see *Bank of New South Walles v Goulburn Valley Brother Co Pty Ltd* followed by *Yogambika Nagarajah*. However 27 days later (on 30 August 2007), the appellant bank received the said letter of complaint dated 27 August 2007 signed by Musa and Adjes. The gist of the said, letter is that there was allegation of fraud committed regarding the resignation of Musa as a director of the respondent company and the application for the two new signatories. The said letter clearly indicates that the previous mandate given by the respondent company in respect of the signatories to the account shall remain unchanged ie the said current account shall continue to be operated by Adjes bin Bunya, James Wong and/or Christopher James Lagen, and not otherwise. Paragraph 12 of the said letter clearly gives a warning to the appellant bank that the appellant bank 'will be held responsible and/or liable for any loss and damage in the event of your (the Bank) taking instruction from the said Pang Fook Ken @ Peter and/or Lee Nyet Ying.' The respondent had lodged reports to the police and Companies Commission Malaysia (CCM) on the matter and a copy each of the reports were enclosed in the said letter.

[37] In our view, the said complaint letter together with all the supporting documents enclosed, namely the reports lodged with the police and the CCM was sufficient to create reasonable ground and belief (although not necessarily proof) on the appellant bank, on the fraudulent element regarding the directorship of the respondent company, the status and authority of the signatories to the account in question and the validity of the new mandate. The said complaint letter cannot be simply disregarded by the appellant bank. In that sense, the appellant bank was clearly 'put on inquiry' and based on the authorities cited above (*Barclay Bank plc* and *Lipkin Gorman*) the appellant bank must refrain from executing the order and to freeze the said account pending further inquiry or investigation by the appellant bank to determine the dispute.

[38] In this case, the said letter of complaint was hand delivered to the appellant bank at about 4pm on 30 August 2007 (which was a Thursday). The next day, 31 August 2007 a Friday, was a public holiday to celebrate the National Day. This was followed by weekend's holidays, Saturday and Sunday which fell on 1–2 September 2007. On these days the appellant bank had no opportunity to verify with the respondent or other authorities about the allegations made in the said letter. The next working day was the following Monday which fell on 3 September 2007, being the same day when the appellant bank froze the respondent's account.

[39] Immediately in the morning of 3 September 2007, the appellant bank started its inquiry or investigation, the earliest of which was the search with the CCM. The search was conducted on 3 September 2007 at 9.03am. Immediately after that, the appellant bank froze the respondent account, as the search result showed that Adjes and Musa were in fact still the directors of the respondent company, which supported the contents of the said complaint letter.

[40] In the circumstances, the appellant bank did the correct thing, bearing in mind that the authorities clearly showed that 'its duty as a bank to the respondent as a customer in observing reasonable skill and care in and about executing the customer's order was subordinate to the bank's other conflicting contractual duties, such as its prima facie duty when it received a valid and proper order to execute the order promptly on pain of incurring liability for consequential loss to the customer'.

[41] The paramount duty of the appellant bank in the circumstances of the present case is to safeguard or protect the customer's money in the account held by the bank. It overrides the bank's duty to honour cheques and to execute the order given for withdrawal of the money in the account. As described by Steyn J in *Barclays Bank plc* what the appellant bank did in this case was to 'guard against facilitation of fraud and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties'.

[42] The appellant bank was correctly guided by the principle of law as established in all the authorities cited above that it cannot execute any order knowing 'it to be dishonestly given, or shuts its eyes to an obvious fact of dishonestly or fraud, or acted recklessly in failing to disclose material facts'. Failure to abide by the said rule the appellant bank will plainly be liable for all consequential damages suffered by the respondent.

[43] In the circumstances of the present case, the appellant bank cannot be faulted for freezing the respondent account. There is no male fide element on its part. The appellant bank breached no duty of care towards the respondent as expected under the relevant laws. Due to the urgency of the situation and the circumstances faced by the appellant bank, freezing the said account was the most appropriate action to be taken to preserve the status quo of the said account. The appellant bank was under a duty to ensure that the interest of the right party is protected and no funds withdrawn from the account without proper and valid authority or mandate. Any reasonably prudent banker faced with the same circumstances would to the same thing as what was done by the appellant bank and regard the course of action taken on the facts justifiable.

[44] Due to the urgency of the situation, the appellant bank is not required

to inform the respondent about the intended freezing of the account before it was carried out. It is plainly not practical to give prior notification to the respondent in the circumstances of the situation. This is to avoid 'jumbo' withdrawal from the account even minutes before the actual freezing was carried out by the bank, if the account holder (ie the respondent) was notified earlier of the intention to freeze the said account. There are no provisions either in law or contract/agreement between the parties which require the appellant bank to give prior notification before freezing the account. It is also not a standard practice of banks in their operation in the industry. Prudence and common sense prevails. Therefore the absence of prior notification by the appellant bank cannot be considered as an unreasonable behavior of the appellant bank in the circumstances of the case, as contended by the respondent.

[45] During the freezing period, three cheques were issued by the respondent under the said account. There were not honoured and returned to the payees with on endorsement 'Pending Confirmation' on the slips. The account was frozen to facilitate an inquiry or investigation by the appellant bank in order to confirm the validity of the mandate and signatories in relation to the said account. Such an enquiry must and will obviously take time. In the mean time, status quo must be maintained by freezing the said account immediately. The whole process was correctly termed 'Pending Confirmation' and as such those words were correctly stamped on the slips to all the three cheques when they were returned to the payees. In *Paget's Law of Banking*, (11th Ed). At pp 337–338, the learned author says, 'when a cheque is dishonoured it is usual for the drawee bank to put a note on it indicating the reason fro dishonor'.

[46] In our present case, the real reason per the three cheques not being honoured by the appellant bank is that the account was frozen pending confirmation on the validity of the mandate and signatories based on the complaint letter. That is the real and true reason, and the words 'Pending Confirmation' actually indicate the reason. Those words do not disparage the respondent's reputation or to lower the respondent in the estimation of right thinking people generally, particularly those who are familiar with the operation of the banking system globally. Those words obviously do not indicate that the respondent company has insufficient fund in its account and therefore are not defamatory or libelous in nature, (see *Sim v Stretch* [1936] 2 All ER 1237 (House of Lords)).

CONCLUSION

[47] Based on the above considerations, we are of the view that the learned JC had erred in coming to his findings and decisions in the present case, which warrant interference by this court (see *Abdul Rahim Abdul Hamid & Ors v*

Perdana Merchent Bankers Bhd & Ors; and *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) & Another Appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163).

[48] We therefore unanimously allow the appeal with costs of RM10,000 to be paid by the respondent to the appellants. We also make an order that the deposit to be refunded to the appellants.

Appeal allowed with costs of RM10,000.

Reported by Kohila Nesan